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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1968

No. 745

C. L. HILLIARD

Appellant,

—vs—

CITY OF GAINESVILLE, FLORIDA

Appellee.

APPEAL FROM THE SUPREME COURT
OF THE STATE OF FLORIDA

STATEMENT AS TO JURISDICTION

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1968

C. L. HILLIARD,

Appellant,

—VS—

CITY OF GAINESVILLE, FLORIDA,

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APPEAL FROM THE SUPREME COURT
OF THE STATE OF FLORIDA

STATEMENT AS TO JURISDICTION

The Appellant, C. L. HILLIARD, pursuant to United States Supreme Court Rules 13(2) and 15, hereby files his statement as to this Court's jurisdiction on appeal to review the final decision in question made and entered by the Supreme Court of Florida.

OPINIONS BELOW

The first opinion rendered in the case is unreported and was entered as an Order on Appeal by the Circuit Court of Florida, Eighth Judicial Circuit. The opinion of the Florida District Court of Appeal, First District, is reported as *City of Gainesville* v. *Hilliard,* 207 So.2d 520 (Fla. App. 1968). The

opinion of the Florida Supreme Court is reported as *Hilliard v. City of Gainesville*, 213 So.2d 689 (Fla. 1968). Copies of the above three opinions are attached to this jurisdictional statement pursuant to United States Supreme Court Rule 15(h).

JURISDICTION

The appeal herein is from a final decision entered by the Supreme Court of Florida upon the Appellant's, Petitioner below, Petition for Writ of Certiorari pursuant to Article 5, Section 4, of the Florida State Constitution. Said Petition requested, inter alia, that the Supreme Court of Florida find Section 27-15 of the Gainesville, Florida, City Code of Ordinances and Section 13(e) of the Gainesville, Florida, City Charter (Ch. 12760, §13 Spec. Acts of Fla. 1927) repugnant to the Sixth Amendment of the United States Constitution as incorporated into the due process clause of the Fourteenth Amendment for the reason that the ordinance and charter provision denied to Appellant his right to trial by jury.

Said judgment under appeal was made and entered on July 17, 1968. An Order denying Appellant's Petition for Rehearing was made and entered on September 23, 1968. Notice of Appeal was filed in the Florida Supreme Court on October 17, 1968.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2). The following decisions are believed to sustain this Court's jurisdiction on appeal: *King Manufacturing Co.* v. *City Council of Augusta*, 277 U.S. 100, 48 S. Ct. 489 (1928); *District of Columbia* v. *Colts*, 282 U.S. 63, 51 S. Ct. 52 (1930); *District of Columbia* v. *Clawans*, 300 U.S. 617, 57 S. Ct. 660 (1937); *Cheff* v. *Schnackenberg*, 384 U.S. 373, 86 S. Ct. 1523 (1966); *Duncan* v. *Louisiana* 391 U.S. 145, 88 S. Ct. 1444 (1968).

The State Statutes involved are Section 27-15 of the Gainesville, Florida, City Code of Ordinances and Section 13(e) of the Gainesville, Florida, City Charter. Code Section 27-15 reads:

> (a) It is unlawful and punishable as provided in sub-section (b) for any person who is a habitual user of narcotic drugs or any person who is under the influence of alcoholic beverages, narcotic drugs, barbiturates or central nervous system stimulants as defined in Chapter 404.01, Florida Statutes, 1965, when affected to the extent that his normal faculties are impaired, to drive or be in the actual physical control of any vehicle within the city.
>
> (b) Every person who is convicted of a violation of this section shall, for the first conviction thereof, be punished by fine or imprisonment, or both, as provided in section 1-8 of the Gainesville Code of Ordinances; for a second conviction within a period of three (3) years from the date of a prior conviction for violation of this section, such person shall be punished by imprisonment for not less than ten (10) days, and in the discretion of the court, a fine of not more than five hundred dollars ($500.00); upon a third or subsequent conviction within a period of five (5) years from the date of conviction of the first of three or more convictions for violation of this section, such person shall be punished by imprisonment for not less than thirty (30) days, and in the discretion of the court, a fine of not more than five hundred dollars ($500.00).

Charter Section 13 (e) reads:

> (e) Duties of judge generally. It shall be the duty of the municipal judge to hold terms of court at such time and in such places as may be designated by the commission for the trial of all persons charged with the violation of any ordinances of the city, which trial shall be without jury and upon

conviction of such person or persons to impose upon him or them such penalty as may be provided by such ordinance.

The Florida Supreme Court held these sections to be constitutional in finding that in a city prosecution for a violation of Gainesville Code Section 27-15 the Defendant had no right to trial by jury.

QUESTION PRESENTED

Does the right to jury trial guaranteed by the Sixth Amendment as incorporated into the due process clause of the Fourteenth Amendment extend to one accused of violating Section 27-15 of the Code of Ordinances, City of Gainesville, Florida?

STATEMENT OF THE CASE

On March 10, 1966, Appellant, C. L. Hilliard, was arrested and charged with the offense of driving while under the influence of intoxicating beverages, a violation of Section 27-15 of the Gainesville, Florida, Code of Ordinances. This arrest, under the ordinance, placed the Appellant in the definitional category of a third time offender.

In the situation of a third conviction the ordinance provides the following penalties: a mandatory incarceration period of thirty days, maximum sixty, and a possible fine of $500.00. Concomitantly a third conviction under the ordinance carries with it a mandatory revocation of the offender's drivers license for one year, maximum five years. This revocation is effectuated by virtue of Florida Statute §322.26 which directs the Florida Department of Public Safety to revoke a driver's license upon receiving the record of a municipal conviction for driving while intoxicated. The duration of such revocation is set out in Florida Statute §322.28 and is dependant upon the total number of convictions within a certain specified time period.

Except as to penalty, Gainesville Ordinance 27-15 is identical to Florida Statute §317.201 (1965) which denounces driv-

ing while intoxicated as a state misdemeanor. In reference to a third time offender the state statute provides for a mandatory incarceration period of thirty days and authorizes a maximum incarceration period of one year. A state conviction also carries with it a possible fine of $500.00 and a mandatory license revocation for one year, maximum five years, pursuant to the provisions of Florida Statute §322.28. Noteworthy here is the fact that in a state prosecution under Florida Statute §317.201 the defendant has a right to a jury trial.

The Appellant was brought to trial in the Municipal Court of Gainesville, Florida, on March 29, 1966. At that time his counsel filed a Request for a Jury Trial (R - Vol. I, p. 5) arguing as follows:

> "The basis of my argument on the request for a jury trial is this, your Honor; that although Section 13 of the Charter of the City of Gainesville, which is a special Act of the Legislature, provides in essence that the trial be held without a jury, in the instance of charges of DWI where an individual may be deprived of his liberty. I take the position that the due process clause and the equal protection clause of both the State and Federal Constitutions are such that they override the provisions of the Charter in depriving the offender of the right to jury trial (R - Vol. I, p. 23).

The Municipal Court denied the request (R - Vol. I, p. 24). The Appellant was ultimately convicted.

Subsequently an appeal was taken to the Circuit Court of Florida, Eighth Judicial Circuit. Appellant's Assignments of Error number five contended that the Municipal Court erred in denying the Defendant's Request for a Jury Trial (R - Vol. I, p. 12). On December 19, 1967 the Circuit Court, proceeding solely on the basis of the right to a jury trial, entered an Order on Appeal quashing the judgment and sentence of the Municipal Court. The Order on Appeal said in part:

> It should be accepted without argument that under present day conditions driving an automobile while under the influence of intoxicants is an offense of a serious nature . . . . . A summary trial in cases of this serious nature should not displace the formality of a trial under state statutes and rules of procedure, which are geared toward the protection of the basic rights our forefathers established and preserved.

On January 5, 1968, the City of Gainesville filed a Petition for Writ of Certiorari in the Florida District Court of Appeal, First District, contending that the Circuit Court was holding itself out in opposition to the law of Florida. The District Court of Appeal, in an opinion filed on February 22, 1968, reversed the Order of the Circuit Court reasoning in part as follows:

> . . . it should not be left to speculation, conjecture and guesswork on the part of municipal and state court judges of Florida as to just what offenses are to be considered serious, thereby assuring a person charged with their violation of a trial by jury, and which offenses may be considered petty and trivial for which no trial by jury is necessary. If a right to a trial by jury in the municipal courts of this state is to be accorded in the prosecution of all serious offenses, the legislature should enact laws specifying those offenses declared to be of a serious nature, and clearly providing that in the prosecution of any one charged in any court with their violation a trial by jury must be accorded. Until such legislation is enacted, we think it would be an usurpation of power for the various courts of the state to attempt in piecemeal fashion to define by judicial legislation all offenses under state law and municipal ordinances which must be considered serious and for the trial of which a jury must be provided.

A Petition for Rehearing of the matter was denied by the Court on March 12, 1968.

Appellant herein then filed in the Florida Supreme Court a Petition for Writ of Certiorari. The Petition was granted by the Court on March 26, 1968, and a final decision was rendered in the cause on July 17, 1968. In its opinion the Court stated the federal question as follows:

> The third and final argument is that the denial of a trial by jury deprived petitioner of a right guaranteed by the *Florida Declaration of Rights* §§ 3 and 11, and by the Sixth Amendment to the Constitution of the United States via the provisions of the Fourteenth Amendment.

In ruling on this question the Florida Supreme Court held:

> It has long been the rule in this state that the right of trial by jury does not extend to violations of a municipal ordinances. (Citation omitted) The announced reason for the rule has been that the guarantee does not extend to cases for which there was no right to a jury trial prior to adoption of the Constitution . . . the Supreme Court of the United States has recently held that the Sixth Amendment does apply to the states when "serious crimes" as distinguished from "petty offenses" are involved. For the federal system, the United States Supreme Court has defined "petty offenses" as those punishable by not more than six months imprisonment and a $500.00 fine. *Cheff* v. *Schnackenberg*, 384 U.S. 373 (1966). On the other hand, in dealing with state law, the same court has held that a crime punishable by a prison sentence up to two years is a "serious crime" which requires a jury trial as a matter of right. *Duncan* v. *Louisiana*, No. 410, U.S. Sup. Ct., opinion filed May 20, 1968. We will not speculate where the line of demarcation between "serious" and "petty" will be eventually drawn. Suffice it to note that the maximum penalty which can be prescribed by

a Florida municipal ordinance is well below the "petty offense" maximum indicated by *Cheff* v. *Schnackenberg*, supra.

Appellant petitioned for rehearing in the cause to enable a presentation of further argument in light of the Duncan decision, *supra*, handed down by this Court after the briefs had been filed and oral argument made in the case *sub judice*. The Petition was denied without opinion on September 23, 1968.

THE FEDERAL QUESTION IS SUBSTANTIAL

In *Duncan* v. *Louisiana*, *supra*, this Court held, in incorporating the Sixth Amendment jury trial guarantee into the Fourteenth Amendment, that "in the American States, as in the federal judicial system, a general grant of jury trial for serious offenses is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants." Appellant contends that the offense *sub judice* is within the serious offense ambit of the Sixth Amendment as outlined in *Duncan* v. *Louisiana*, *supra*, *Cheff* v. *Schnackenberg*, *supra*, *District of Columbia* v. *Clawans*, *supra*, *District of Columbia* v. *Colts*, *supra*, *Callan* v. *Wilson*, 127 U.S. 540, 8 S. Ct. 1301 (1888), and *Schick* v. *United States*, 195 U.S. 65, 24 S. Ct. 826, (1904). Accordingly a jury trial should obtain.

In determining whether or not an offense is "serious" a proper Sixth Amendment inquiry is the intrinsic nature of the offense, *District of Columbia* v. *Colts*, *supra*. The Colts case involved reckless driving, an infraction in which the driving while intoxicated offense finds its genesis if not its equivalent. Justice Sutherland, speaking for the majority in Colts, described the nature of reckless driving as "an act of such obvious depravity that to characterize it as petty would be to shock the general moral sense."

The major consideration which colored misconduct intrin-

sically serious at common law, as pointed out in the often quoted article by Frankfurter & Corcoran, Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury, 39 Harv. L. Rev. 917 (1926), was the gravity of the danger to the community from the misconduct. In giving this past history present application, the gravity of the potential harm to today's public posed by an intoxicated driver should be accepted without argument.

District of Columbia v. *Clawans*, *supra*, delineates a second inquiry in the Sixth Amendment process of "petty-serious" classification. The penalty authorized by the law of the locality for the particular offense under scrutiny must be considered as this "is a guage of its social and ethical judgments" of the offense. Clawans also noted that a "penalty once thought mild may come to be regarded as so harsh as to call for the jury trial." A third conviction under Gainesville ordinance 27-15 warrants a maximum penalty of sixty days incarceration and $500.00 fine. This perhaps seems petty, however, determinative of the severity of the offense is the fact that thirty days of the sixty day sentence is made mandatory by the terms of the ordinance.

More critical to the penalty inquiry is the license revocation that accompanies a municipal conviction. A five year revocation period is possible and a one year revocation period is mandatory. In modern life the use of the automobile as a necessary adjunct to the earning of a livelihood should require, in the interest of realism, a conclusion that the ability to take away this right for five years is the ability to impose grave criminal sanctions.

Relevant also is that the Florida Statute which proscribes the identical offense a state misdemeanor and requires the same license revocation period, provides for a maximum incarceration period of one year. Since the penalty provision for a particular offense is to be used to measure the social judgment of that offense, the one year jail sentence under the state statute becomes important even though "forum shopping" in the in-

stant case resulted in municipal jurisdiction and its diminutive power of a sixty day maximum sentence.

In the "serious petty" decisional technique *Duncan* v. *Louisiana*, *supra*, directs yet another inquiry a survey of the laws and practices in the nation. Such an inquiry reveals that the appellate courts of eleven states have recently (ten pre Duncan) been presented with the driving while intoxicated query. Varying shades of factual distinctions are evident in these cases, however, the total picture is clearly in favor of the jury trial right. Those states granting jury trials in municipal prosecutions are Arizona in *Rothweiler* v. *Superior Court of Pima County*, 410 P. 2d 479 (1966); Colorado in *City of Canon City* v. *Merris*, 323 P. 2d 614 (1958); Minnesota in *State* v. *Hoben* 98 N.W. 2d 813 (1959); Ohio in *Lima* v. *Rambo*, 177 N.E. 2d 554 (1960); Washington in *Artis* v. *Rowland*, 393 P. 2d 815 (1964); and Wisconsin in *State* v. *Schmiege*, 28 N.W. 2d 345 (1947). Those states granting jury trials on appeal are Idaho in *Miller* v. *Winstead*, 270 P. 2d 1010 (1954) and Oklahoma in *Evans* v. *Lambert*, 418 P. 2d 217 (1966). Those states denying a jury trial are Florida in *Hilliard* v. *City of Gainesville*, *supra*, Nebraska in *State* v. *Lookabill*, 125 N.W. 2d 695 (1967) and New Mexico in *Tucumcari* v. *Briscoe*, 275 P. 2d 958 (1954).

The "petty-serious" dichotomy finds its basis in the common law. However, the Frankfurter article, supra, cautions that the history of the common law cannot solve the judgment as to "petty or serious" which it raises. It has been said that at common law the right to jury trial did not extend to violations of municipal ordinances, *Hilliard* v. *City of Gainesville, supra,* a statement which, in its generality, is more fictitious than real. At common law, a municipality had no power to imprison. Tiedman on Municipal Corporations §156 (1894). Furthermore, the realm of municipal legislation was confined to those acts or omissions of purely a local nature. Consequently, as noted in

Callan v. *Wilson*, *supra*, only those municipal prosecutions which did not relate to acts and omissions that were embraced in the general criminal legislation of the state could be prosecuted summarily.

The reality, therefore, of the summary procedure utilized in a common law prosecution for an ordinance violation, is simply that municipal by-laws did not, at common law, concern serious offenses. In other words, if a municipal ordinance deals with a serious offense, the fact of municipal jurisdiction should not work a denial of the offender's jury trial right.

Duncan v. *Louisiana*, *supra*, applied the Sixth Amendment jury trial right to "state" prosecutions. Appellant submits here that municipal prosecution is state prosecution for a municipal corporation is a subordinate instrumentality of the state exercising delegated authority only. *King* v. *City Council of Augusta*, *supra*. Furthermore, since a state has no power, post-Duncan, to prosecute a serious offense summarily, it cannot accomplish indirectly what is prohibited of it directly by delegating such a power to a municipality. As a state must comply with the Fourteenth Amendment so must its political subdivisions. *Avery* v. *County of Midland, Texas*, 88 S. Ct. 1114 (1968).

In turning to the opinion below, Appellant maintains that the Supreme Court of Florida incorrectly adjudged Appellant's federal jury trial right. The State Court's reliance on municipal jurisdiction as a determinative factor in its decision to withhold the jury trial guarantee was misplaced. In addition, the Court below misinterpreted Duncan in viewing the penalty provision as the only consideration in labelling an offense as petty or serious. And in its scrutiny of the punishment which accompanies the offense under review, the Court completely ignored the severe license revocation penalty. The State Court also expressed a reluctance to classify the particular offense as petty or serious, a definitional task which, according to Duncan, must be faced by the courts in the absence of legislation.

The opinion below evidences no adequate state grounds to uphold the decision made therein. The federal question presented by that decision and this Appeal is neither frivolous nor foreclosed. Appellant contends that if the decision of the Supreme Court of Florida is allowed to stand the protection of a federal constitutional right will be thwarted—the right to a jury trial in a prosecution for the serious offense proscribed by Ordinance 27-15, City of Gainesville, Florida.

CONCLUSION

Wherefore, it is respectfully submitted that this Court has jurisdiction of this Appeal under Section 1257(2), Title 28, United States Code.

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APPENDIX

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IN THE CIRCUIT COURT OF FLORIDA,
EIGHTH JUDICIAL CIRCUIT
IN AND FOR ALACHUA COUNTY

C. L. HILLIARD,

Appellant,

—VS—

CITY OF GAINESVILLE, FLORIDA,

Appellee.

ORDER ON APPEAL

The Defendant was convicted in the Municipal Court of the City of Gainesville for violating Section 27-15 of the Code of Ordinances of the City, the offense commonly referred to as "driving while intoxicated." The Municipal Court denied Defendant's request for a jury trial. This ruling has been assigned as error in this appeal.

The Defendant here asserts that he was convicted and punished for a crime by proceedings quasi-criminal, *City of Miami* v. *Gilbert,* 102 So.2d 818 (Fla. App. 1958), as a result of which he was denied the right of trial by jury as provided by Section II of the Declaration of Rights, Florida Constitution, and which was also violation of his rights secured under Article III, Section 20, of the Florida Constitution, and Section 12 of the Declaration of Rights of Florida Constitution.

The question presented may be narrowed to the following. Where a municipality has adopted an ordinance, which the Legislature has said must be identical with state law and carry identi-

cal sanctions, may the municipality by prosecution under such ordinance deny to the Defendant the constitutional and statutory safeguards which would surround him had he been prosecuted for the same offense under state law? The test to be applied in determining whether or not the state law and the Municipal Ordinance cover the identical offense is whether one can be violated without violating the other. *City of Crawfordsville* v. *Jackson*, 170 N.E. 850, 201 Ind. 619. It may be conceded that had the Defendant been prosecuted under § 317.201 of the state law he would have been entitled to a jury trial.

The city relies heavily upon the cases of *Hunt* v. *City of Jacksonville, Fla.* 1894, 16 So. 398, *State ex rel Sellers* v. *Parker, Fla.* 1924, 100 So. 260, and *Boyd* v. *County of Dade, Fla.*, 1960, 123 So.2d 323, to sustain its position. In none of the cited cases was the issue before this Court decided and directly passed upon. Indeed, in the *Boyd* case the Supreme Court expressly noted:

> "There is no contention in these Todd and Boyd cases that the offense does not properly fall within the authority of the Dade County Commission to denounce. In decisions subsequent to Hunt v. Jacksonville, supra, little, if any, comment has been made upon the subject.* * * *

The Court there did not comment or pass upon the impact of the provisions of Chapter 317, Florida Statutes.

The provisions of Sec. 27-15 of the Code of Ordinances of the City of Gainesville is the identical offense denounced in § 317.201, Florida Statutes. The Legislature has provided by § 317.041 that § 317.201 applies not only outside of municipalities, but also within the boundaries of incorporated municipalities. To insure uniformity of the application of § 317.201, the Legislature enacted § 317.043, which prohibits municipalities from passing or attempting to enforce any ordinance in conflict with § 317.201.

Label the judicial process as one will, no resort to subtlety can refute the fact that the power to imprison is a criminal sanction, and to view otherwise is a self-delusion. *City of Canon City* v. *Merris,* 137 Colo. 169, 323 P. 2d 614.

In the *Boyd* case, supra, the Supreme Court said:

> "The offense must be a petty and trivial violation of regulations established under the police power of the state, in order that the offender may be summarily tried, convicted, and punished without indictment by a grand jury and without trial by a petit jury. It must, of course be assumed that the punishment for such a petty and trivial offense will also be comparatively petty and trivial, otherwise it would violate another provision of the state Constitution, which prohibits cruel and unusual punishment. But, assuming that the punishment will bear proper relation to the seriousness of the offense, the theory * * * * which gave rise to the distinction at common law and in subsequent statutes, is that the convenience and benefit to the public resulting from a prompt and inexpensive trial and punishment of violation of petty and trivial police power regulations are more important than the comparatively small prejudice to the individual resulting from his being deprived of the safeguard of indictment before having to answer and of trial by a jury when held to answer. This, of course, is the converse of the rule with regard to serious offenses, crimes, and misdemeanors, where for the preservation of the liberties of the people, the security afforded the individual by his right to trial by jury is more important than the mere convenience of the public arising from a speedy and inexpensive summary trial."

It should be accepted without argument that under present day conditions driving an automobile while under the influence of intoxicants is an offense of a serious nature, *State* v. *Hoben*, (Minn. 1959) 98 N.W. 2d 813. Conviction of such an offense results in the revocation of a driver's license. Whether the right to drive is termed a "privilege" or a "right", the Supreme Court of Florida has recognized that such a license, once granted, is of substantial value to the holder. This is particularly true when the driver depends for his livelihood upon the operation of a motor vehicle. See *Carnegie* vs. *Department of Public Safety*, Fla. 1952, 60 So.2d 728.

In considering the provisions of Section 317.041 and Section 317.043, Fla. Stat., it becomes apparent that the legislature intended the application of Section 317.201 to be uniform throughout the state, both as to offense, penalty and procedure.

It is illogical for the legislature to define a crime, specify punishment therefor, provide that its application shall be uniform throughout the state, and then to permit a municipality to prosecute that crime and imprison Defendant upon conviction without granting him the safeguards he would receive in a state court.

A summary trial in cases of this serious nature should not displace the formality of a trial under state statutes and rules of procedure, which are geared toward the protection of the basic rights our forefathers established and preserved. Furthermore, these basic rights of the Defendant, including his right to due process, should not depend upon the arbitrary choice of the arresting officer as to the Court in which action against him would be instituted.

Although this offense can be a dastardly one, and although granting such a Defendant the right to due process may clog the administration of the courts, the constitutional rights of the individual must not be overlooked.

Acquitting an innocent man charged with a heinous crime

is more important that convicting the guilty, and the administrative problems of the court are secondary to the administration of justice in accordance with established rules of procedure.

The judgment and sentence of the Municipal Court are quashed and the appellant is discharged.

DONE AND ORDERED at Gainesville, Alachua County, Florida, on this 19th day of December, 1967.

/s/ James C. Adkins, Jr.
CIRCUIT JUDGE

IN THE DISTRICT COURT OF APPEAL,
FIRST DISTRICT, STATE OF FLORIDA,
JANUARY TERM, A.D. 1968

CITY OF GAINESVILLE, FLORIDA,

Petitioner,

vs

C. L. HILLIARD,

Respondent.

Opinion filed February 22, 1968.
Original Jurisdiction—A Petition for Writ of Certiorari from the Circuit Court for Alachua County;
James C. Adkins, Jr., Judge.

Osee R. Fagan of Fagan, Crouch & Anderson, for Petitioner.

Richard J. Wilson, for Respondent.

WIGGINTON, Chief Judge.

Petitioner seeks review by certiorari of a judgment rendered by the circuit court of Alachua County sitting in its appellate capacity, which quashed a judgment rendered by the municipal court of the City of Gainesville finding respondent guilty of the offense of driving a motor vehicle while intoxicated. The basis of the judgment appealed is that respondent's constitutional rights were violated when his request for a jury trial of the offense with which he was charged in the municipal court was denied.

The primary question presented for decision may be stated in the following manner. Where an offense is denounced in

identical terms both by a municipal ordinance and a state statute, is the offender entitled as a matter of constitutional right to a jury trial in a prosecution for violation of the municipal ordinance to the same extent as if he were prosecuted in a state court for the violation of the state statute.

Respondent was charged in the municipal court of Gainesville with the offense of driving a motor vehicle while under the influence of alcoholic beverages. The ordinance in question is identical in terms with Section 317.201, Florida Statutes, which proscribes the same act and makes it a state offense punishable as a misdemeanor, the only difference being that the penalty provisions of the ordinance are less severe than those of the statute. Respondent's timely request for a jury trial was denied. Upon conviction respondent appealed to the circuit court alleging as error the deprivation of his constitutional rights in being denied a trial by jury. The circuit court agreed with respondent and quashed the judgment of conviction and sentence. Petitioner contends that the judgment of the circuit court is erroneous as a matter of law and should be reversed.

As stated above, the ordinance which respondent was charged with violating is identical in all material respects with Section 317.201, F.S. It is conceded that had respondent been charged and prosecuted in a state court for violation of the counterpart state statute, he would have been entitled to a jury trial. It is furthermore conceded that the ordinances of the City of Gainesville provide that trials shall be by the municipal judge without a jury.

In its judgment of reversal the circuit court found that the offense with which respondent was charged was not petty or trivial but was of a serious nature authorizing the imposition of criminal sanctions in the form of imprisonment in the city jail and loss of driver's license. Because of these factors the court held that in the prosecution of such offenses, the person charged is entitled to a trial by jury. The circuit court also relied upon

the provisions of Section 317.043, F. S.,[1] which prohibits municipalities from passing or attempting to enforce ordinances in conflict with the statute denouncing the operation of a motor vehicle while under the influence of alcoholic beverages.[2] By reading Sections 317.041, 317.043, and 317.201 in pari materia the circuit court concluded that it was the intent of the legislature that the statute denouncing the offense of driving a motor vehicle while under the influence of alcoholic beverages should be applied uniformly throughout the state, both as to offense, penalty, and procedure. Based upon this finding the circuit court ultimately concluded that the legislature intended to require the same procedural safeguards, including trial by jury, in the prosecution of a person in a municipal court for the offense of driving while intoxicated as are provided in prosecutions for violation of the counterpart state statutes.

The law of this state appears to be well settled that unless prohibited by some provision of the Constitution or state law, the legislature may grant a municipality the power to enact ordinances which provide for the punishment of acts which likewise constitute crimes denounced by the statutes of the state.

The Constitution provides that the legislature shall have the power to establish, and to abolish, municipalities, to provide for their government, and to prescribe their jurisdiction and powers.[3] The charter granted petitioner by the legislature specifically empowered it to exercise general police powers and powers

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[1] §317.043, F.S.
"Conflicting ordinances prohibited; exception
It is unlawful for any municipal corporation to pass or attempt to enforce any ordinance in conflict with the provisions of this chapter; provided, however, that this section shall not apply to school zones."

[2] § 317.201. F.S.

[3] Article VIII, § 8, Florida Constitution.

in the promotion of the general welfare of the city.[4] It was pursuant to this charter authority that the ordinance in question was enacted. In the early case of *Theisen* v. *McDavid*[5] the question was raised as to whether the legislature may constitutionally delegate to a municipality the power to punish by ordinance an act made punishable as a crime or misdemeanor against the state laws, and for which the offender may be informed against and indicted and tried in the state courts. In answering this question in the affirmative the Supreme Court of Florida said:

> "It is contended for the plaintiff in error that under no circumstances can the legislature constitutionally delegate to a municipality the power to punish by ordinance any act made punishable as a crime or misdemeanor against the state laws, and for which the offender may be informed against or indicted and tried in the state courts, and that the city ordinance in question here is invalid and void because the act it undertakes to punish as an offense against the laws of the municipality was made a criminal offense and punishable under the state laws. . . . [T]he overwhelming weight of the authorities, with which our views accord, supports the contrary rule, —that there is no impropriety, from a constitutional standpoint, in clothing our municipal governments with legislative power to prohibit and punish by ordinance any act made penal by the state laws, when perpetrated within municipal limits, and that it is no objection to such an ordinance that it prescribes the same penalties as the state law for the commission

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[4]Chapter 12760, § 7(x) (y), Laws of Florida, Special Acts of 1927.

[5]Theisen v. McDavid, 34 Fla. 440, 16 So. 321, 322.

> or omission of the same act, and that the offender may be tried and punished for the same act under both the ordinance and the state law, and that a conviction or acquittal under the one is no bar to the prosecution under the other, and that it is no objection to the municipal ordinance that the trial thereunder is without jury. . . . "

The foregoing principle was subsequently adhered to and reaffirmed in *Gillooley* v. *Vaughn*.[6]

The dispute which precipitates this controversy finds its origin in that provision of our Constitution which guarantees to persons charged with crime the right to a speedy and public trial by an impartial jury.[7]

In *State* v. *Parker*[8] petitioner was tried in the municipal court of Jacksonville and convicted of the offense of driving a vehicle while under the influence of intoxicating liquor. At the trial he demanded but was refused the right to a trial by jury. In his petition for writ of habeas corpus he assigned as error the refusal of the city to grant him a jury trial thereby rendering the ordinance void and his conviction illegal. In rejecting this contention, the Supreme Court said:

> "Section 3 of the Declaration of Rights in our Constitution, providing that 'the right of trial by jury shall be secure to all, and remain inviolate forever,' was never intended to *extend the right* of jury trial, but merely *secures it* in the cases *in which it was matter of right before the adoption of the Constitution*. Trials in municipal courts for infractions of municipal ordinances were conducted generally with-

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[6]Gillooley v. Vaughn, 92 Fla. 943, 110 So. 653.

[7]Declaration of Rights, § 11, Florida Constitution.

[8]State ex. rel. Sellars v. Parker, 87 Fla. 181, 100 So. 260, 261, 262.

> out juries prior to the adoption of our Constitution, and therefore do not fall within the constitutional guaranty, and offenders against such ordinances are not entitled to a jury trial in such courts . . . . "

In *Boyd* v. *County of Dade*[9] petitioner was likewise charged in the metropolitan court of Dade County with the offense of driving a vehicle while under the influence of intoxicating liquor. Petitioner requested but was denied a right to trial by jury on the charge against him. After conviction he appealed the judgment rendered against him challenging the validity of his conviction on the constitutional ground, among others, that he had been wrongfully deprived the constitutionally guaranteed right to a trial by jury. In rejecting this contention the Supreme Court, speaking through Mr. Justice Drew, said:

> "In an unbroken line of cases since *Hunt* v. *City of Jacksonville,* we have held that violations of municipal ordinances were infractions, the trial for which could be conducted without a jury trial. In state *ex rel. Sellers* v. *Parker,* Supt. of the City Prison Farm, the relator Sellers was tried, convicted and sentenced in the municipal court of Jacksonville to imprisonment for a period of thirty days for the offense of operating a motor vehicle while under the influence of intoxicating liquor. In a habeas corpus proceeding the relator Sellers contended, among other things, that he was entitled to discharge for reason that the Jacksonville City Ordinance was unconstitutional and invalid, as being repugnant to Sections 3 and 11 of the Declaration of Rights of the Florida Constitution, and the Fifth and Sixth Amendments of the Constitution of the United States, both of

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[9]Boyd v. County of Dade, (Fla. 1960) 123 So. 2d 323, 328.

which guaranteed to the relator the right of trial by jury. This Court affirmed the order of the circuit court denying the relator's petition. In this case the Court set at rest for all time the question of right to trial by jury for the violation of offenses denounced by municipal ordinances. In that decision this Court particularly pointed out the fact, an obvious one, that the Fifth and Sixth Amendments to the Federal Constitution have no application whatever to proceedings in state or municipal courts. We further held in that case that Section 11 of the Declaration of Rights of the Florida Constitution has no application whatever to trials for violation of municipal ordinances and that Section 3 of the Declaration of Rights of the Florida Constitution was never intended to extend the right of jury trial but had the effect only of securing it in the cases in which it was a matter of right before the adoption of the Constitution. We pointed out there that trials in municipal courts were conducted generally without juries long prior to the adoption of our Constitution, and therefore, did not fall within the constitutional guarantees insuring jury trials . . . . "

From the foregoing authorities we conclude that under the settled law of this state respondent was not entitled to a trial by jury for the violation of the ordinance of the City of Gainesville proscribing the operation of a motor vehicle by a person while under the influence of intoxicating beverages.

In the judgment appealed from the circuit court quoted an excerpt appearing at the conclusion of the Supreme Court's opinion in the Boyd case, supra, in which the court in turn quoted with approval and made a part of its opinion an excerpt from a decision rendered by the Supreme Court of New Jersey

in the case of *Katz* v. *Eldredge*.[10] The New Jersey court expressed the view that the historical test usually applied to justify the trial of infractions against municipal ordinances without a jury was for the reason that the offenses were petty and trivial violations of regulations established under the policy power of the state for the conviction of which only petty and trivial punishment was administered. The circuit court in the case sub judice was of the view that since the offense for which respondent herein was tried in the municipal court of Gainesville authorized a maximum sentence upon conviction of sixty days imprisonment of $500.00 fine, or both, as well as the loss of his driver's license, the offense was indeed a serious one and could not be classed as trivial or petty within the test applied by the Supreme Court in the Katz case, *supra*. The circuit court therefore concluded that since the offense is not petty or trivial, but of a more serious nature, the constitutional guarantee of trial by jury became applicable, and that such right was wrongfully denied respondent by the municipal court in this case.

There are several reasons why we are unable to agree with the circuit court in the conclusion reached on the point involved herein. Firstly, it should not be left to speculation, conjecture and guesswork on the part of the municipal and state court judges of Florida as to just what offenses are to be considered serious, thereby assuring a person charged with their violation of a trial by jury, and which offenses may be considered petty and trivial for which no trial by jury is necessary. If the right to a trial by jury in the municipal courts of this state is to be accorded in the prosecution of all serious offenses, the legislature should enact laws specifying those offenses declared to be of a serious nature, and clearly providing that in the prosecution of any one charged in any court with their violation a trial by jury must be accorded. Until such legislation is enacted, we

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[10]Katz v. Eldredge, 97 N.J. Law 123, 117 A. 841.

think it would be a usurpation of power for the various courts of the state to attempt in piecemeal fashion to define by judicial legislation all offenses under state law and municipal ordinances which must be considered serious and for the trial of which a jury must be provided.

Secondly, we do not believe that it was the intent of the Supreme Court, by its decision in Boyd, to pronounce a rule of law adopted by the circuit court in this case. The ordinance of the County of Dade for which the appellant Boyd was convicted carried penalties of both fine and imprisonment more severe than those provided for by the ordinances of Gainesville in the case sub judice, and in some instances more severe than the state statute then in effect. We must assume that the Supreme Court was familiar with such penalties because the ordinance which provided them was quoted verbatim in the body of the opinion. The ultimate holding of the court affirming the judgment of conviction negatives any idea that the Supreme Court considered the offense denounced by the ordinance in that case to be of such a serious nature as to require that a person charged with its violation must be accorded a jury trial. We must assume that despite the severity of the penalties contained in the Dade County ordinance, the Supreme Court considered the violation to be of such a nature that it was permissible for it to be tried in the metropolitan court of Dade County without a jury.

Furthermore, we do not read into Section 317.043, F.S., quoted above, any intent on the part of the legislature that a uniform procedure must be followed in both state and municipal courts in the prosecution of persons charged with the offense of driving a motor vehicle while under the influence of intoxicating beverages. The statute in question merely makes it unlawful for any municipal corporation to attempt to pass or enforce any ordinance in conflict with the provisions of Chapter 317, F.S. We find nothing in Chapter 317 which prescribes the procedure

which must be followed in the trial of any one charged with violating its provisions. The matter of procedure to be followed in the trial of persons charged with violating both state laws and municipal ordinances is prescribed in other provisions of the Constitution, statutes, and rules of court. We find nothing in the ordinance involved in this case which could be said to be in conflict with any provisions of Chapter 317 as forbidden by the terms of that chapter.

Lastly, appellant contends that by the enactment of Chapter 317.043, F.S., mentioned above, the legislature intended to pre-empt for prosecution in state courts any one charged with the offense of driving a motor vehicle while under the influence of intoxicating beverages, and to thereby preclude municipalities from adopting or enforcing any ordinances touching upon this area of the law. With this contention we are unable to agree. A cursory examination of Chapter 317, F.S., reveals numerous instances in which the legislature recognizes the right of municipalities to adopt and enforce ordinances proscribing the act of operating a motor vehicle while under the influence of intoxicating beverages, which act is made a state offense under the provisions of the chapter. Such recognition negates the idea that the legislature intended to pre-empt this field of the law for prosecution in state courts only.

For the foregoing reasons the judgment reviewed herein is quashed and held for naught, and the judgment of the municipal court of the City of Gainesville is reinstated.

JOHNSON AND SPECTOR, JJ., CONCUR.

ON PETITION FOR REHEARING

WIGGINTON, Chief Judge.

Respondent has, by petition for rehearing filed herein, invited this court's attention to Chapter 67-308 enacted by the regular 1967 session of the state legislature, which act will ap-

pear in the revised statutes as Sections 322.261 and 322.262, F.S. This act is popularly referred to as the "implied consent law," and prescribes procedure to be followed in obtaining evidence in those cases in which a person is charged with driving a motor vehicle while under the influence of alcoholic beverages. Subsection 3 of Section 322.262, F.S., provides as follows, to wit:

> "Any person charged with driving while under the influence of alcoholic beverages to the extent that his normal faculties were impaired shall be entitled to trial by jury according to the Florida Rules of Criminal Procedure."

Respondent concedes that the above-quoted statute, which does not become effective until July 1, 1968, is not applicable to the case sub judice and should not be given retroactive effect. It is respondent's position, however, that the statute represents a legislative declaration that the offense of driving a vehicle while under the influence of intoxicating beverages is a serious one and is neither petty nor frivolous. It is because of such characterization that respondent urges us to hold that the offense for which he was tried, even though constituting only a violation of a municipal ordinance, was of such a serious nature as to entitle him to a trial by jury.

Although the argument of respondent is meritorious, we are not prepared to say that the above referred to statute should be construed to be applicable to offenses against municipal ordinances which prohibit the operation of vehicles while under the influence of intoxicating beverages, or that it was not the intent of the legislature to confine jury trials in cases of this kind only to prosecutions in state courts. If it had been the intent of the legislature to extend the right to trial by jury in cases of this kind to prosecutions in municipal courts, we feel it would have been more specific in so providing in clear and unambiguous terms.

For the reasons hereinabove stated, the petition for rehearing is denied.

JOHNSON AND SPECTOR, JJ., CONCUR.

IN THE SUPREME COURT OF
FLORIDA, JULY TERM, A.D.
1968

C. L. HILLIARD,

Petitioner,

—vs—

CITY OF GAINESVILLE, FLORIDA,

Respondent.

Case No. 37,238

Opinion filed July 17, 1968
Writ of Certiorari to the District Court of Appeal, First District
Richard J. Wilson, for Petitioner
Osee R. Fagan of Fagan, Crouch & Anderson, for Respondent
THORNAL, J.

By petition for certiorari we have for review a decision of a district court of appeal accompanied by a certificate that the question passed upon is one of great public interest. *Fla. Const.* Art. V, Sec. 4(2); *City of Gainesville* v. *Hilliard*, 207 So. 2d 520, (Fla. 1st Dist. Ct. App. 1968).

We must decide whether the constitutional prohibition of double jeopardy and guarantee of a right to a jury trial extend to violators of a municipal ordinance which proscribes certain conduct in terms identical to a state statute which condemns the same conduct as a crime.

Chapter 27-15 of the Gainesville Code of Ordinances provides in Part:

"(a) It is unlawful and punishable as provided in subsection (b) for . . . any person who is under the influence of alcoholic beverages, . . . when affected to the extent that his

normal faculties are impaired, to drive or be in the actual physical control of any vehicle within the city.

"(b) . . . upon a third of subsequent conviction of the first of three or more convictions for violation of this section, such person shall be punished by imprisonment for not less than thirty (30) days, and in the discretion of the court, a fine of not more than five hundred dollars ($500.00)."

The Gainesville Charter, Section 7 (z), Chapter 12760, Laws of Florida, 1927, prescribes for a violation of a city ordinance a penalty ceiling of sixty (60) days imprisonment or a fine of $500.00 or both. This is consistent with the limitation on municipal penalties imposed by general state law. *Fla. Stat.* §165.19(1965).

The Gainesville Municipal Court Judge, without a jury, found petitioner Hilliard guilty of being a third offender against the above-quoted ordinance. Preliminary to the municipal court hearing, a request for a jury trial was denied. Hilliard was fined $250.00 and sentenced to 30 days in jail, 15 days of which were suspended.

Hilliard's appeal to the Circuit Court resulted in a reversal of the municipal conviction. However, certiorari to the District Court of Appeal, First District, produced a reversal of the Circuit Judge and reinstatement of the judgment of the municipal judge. *City of Gainesville* v. *Hilliard, supra.* Our jurisdiction of the instant petition for certiorari derives from the certification that the question passed upon by the decision is one of great public interest.

Except as to penalty, the Gainesville ordinance is identical to *Fla. Stat.* § 317.201 (1965) which proscribes driving while intoxicated. The penalty authorized by the statute is more severe than that fixed by the Ordinance. The petitioner levels a three-

pronged attack against his conviction. He claims that any one will support a reversal.

First, it is claimed that a trial in the city court for a municipal offense which is described in language identical to that in a state statute which defines a crime punishable also in the state court, does violence to the *Florida Declaration of Rights,* §12, which in part provides that "No person shall be subject to be twice put in jeopardy for the same offense. . .." We pause to note that so far as we know, petitioner has never been subjected to a trial in the state court. He seeks to preclude the city court trial on an assumption that the state will also prosecute him. He argues that either the state *or* the city can try him, but not both. He says that we should dispense with the historical concept that the state and its cities are separate governmental units in view of the fact that municipal power emanates from the state under *Fla. Const.* Art. VIII, §8.

This double jeopardy argument has long been settled contrary to the claims of the petitioner. We see no reason to recede from our established precedent on the subject. Long ago it was decided that an act committed within municipal limits may be punished by city ordinance even though the same act is also proscribed as a crime by a state statute. An offender may be tried for the municipal offense in the city court and for the crime in the proper state court. Conviction or acquittal in either does not bar prosecution in the other. *Theisen* v. *McDavid,* 34 Fla. 440, 16 So. 321 (1894); *State ex rel Sellars* v. *Parker,* 87 Fla. 81, 100 So. 260 (1924), and, *Boyd* v. *County of Dade,* 123 So. 2d 323 (Fla. 1960).

Petitioner's second argument is that the state has in effect pre-empted the field of controlling intoxicated drivers, and has actually prohibited cities from adopting ordinances in this area of the police power. Apparently, he derives some comfort from the provisions of *Fla. Stat.* §317.043 which prohibits municipal corporations from passing ordinances "in conflict" with *Fla. Stat.*

Ch. 317. He says that *Fla. Stat.* § 317.041(1) provides that § 317.201, *supra,* applies in cities as well as non-municipal areas. From this he reason that the cities are without power to control the drunk drivers. The claim is that only the state can do it.

We do not agree that cities are directly or inferentially prohibited from legislating in this area. So long as the municipal ordinance is consistent with the state statute and not in derogation thereof, it will be sustained under the city's general police power. The mere fact that the penalties are not the same does not bring the ordinance into collision with the statute unless the former exceeds a prescribed restriction on municipal penalties. *State ex rel. McFarland* v. *Roberts,* 74 So. 2d 88 (Fla. 1954); *Orr* v. *Quigg,* 135 Fla. 653, 185 So. 726 (1938). We have expressly recognized a legislative intent that municipalities should have the power to try and punish intoxicated drivers of automobiles, even to the extent of participating in the license revocation process. *Smith* v. *City of Gainesville,* 93 So. 2d 105 (Fla. 1957).

The third and final argument is that denial of a trial by jury deprived petitioner of a right guaranteed by the *Florida Declaration of Rights,* §§ 3 and 11, and by the Sixth Amendment to the Constitution of the United States, via the provisions of the Fourteenth Amendment.

It has long been the rule in this state that the right of trial by jury does not extend to violations of municipal ordinances. *Hunt* v. *City of Jacksonville,* 34 Fla. 504, 16 So. 398 (1894). The announced reason for the rule has been that the guarantee does not extend to cases for which there was no right to a jury trial prior to adoption of the Constitution. A jury trial on a charge of violating a municipal ordinance was not a matter of right prior to the adoption of the Florida Constitution.

This Court has held that the "speedy trial, by an impartial jury" provision of the Sixth Amendment, *supra,* applied only

to federal courts, and was not a responsibility imposed upon the states through the Fourteenth Amendment. However, the Supreme Court of the United States has recently held that the Sixth Amendment does apply to the states when "serious crimes" as distinguished from "petty offenses" are involved. For the federal system, the U.S. Supreme Court has defined "petty offenses" as those punishable by not more than six months imprisonment and a $500.00 fine. *Cheff* v. *Schnackenberg*, 384 U.S. 373 (1966). On the other hand, in dealing with state law, the same court has held that a crime punishable by a prison sentence up to two years is a "serious crime" which requires a jury trial as a matter of right. *Duncan* v. *Louisiana*, No. 410, U.S. Sup. Ct., opinion filed May 20, 1968. We will not speculate where the line of demarcation between "serious" and "petty" will eventually be drawn. Suffice it to note that the maximum penalty which can be prescribed by a Florida municipal ordinance is well below the "petty offense" maximum indicated by *Cheff* v. *Schnackenberg*, *supra*. See, *Fla. Stat.* §165.19 (1965).

We pretermit a discussion of Fla. Stat. §322.262(4) (1967). It was enacted subsequent to the trial of the case at bar, and therefore does not control the result. A decision on its effect must await another day.

For the reasons announced above, as well as those advanced by the District Court, the decision under review is approved and the writ is discharged.

It is so ordered.

CALDWELL, C. J., ROBERTS AND DREW, JJ., AND MASON, CIRCUIT JUDGE, CONCUR

ON PETITION FOR REHEARING

Upon consideration of the petition for rehearing, it is ordered that said petition be and the same is hereby denied.

A TRUE COPY,
TEST:
/s/ Sid J. White
SID J. WHITE
Clerk Supreme Court

IN THE MUNICIPAL COURT, CITY OF GAINESVILLE,
ALACHUA COUNTY, STATE OF FLORIDA

CITY OF GAINESVILLE,

Plaintiff,

—VS—

C. L. HILLIARD,

Defendant.

Violation No. 3696 J

Chapter 27-15

Before me, the undersigned authority, personally came Richardson & Eunice who, being duly sworn, says that C. L. Hilliard on the 10 day of March, 1966, within the corporate limits of the City of Gainesville, did violate the Code of the City of Gainesville by operating a motor vehicle on the streets of this City while under the influence of intoxicating liquors or narcotics, barbiturates or other drugs to such an extent as to deprive him of full possession of his normal faculties in violation of Chapter 27-15 of said Code in relation to traffic.

Sworn to and subscribed before me this 29 day of March 1966.

(Notarized)

/s/ L. P. Richardson & E. E. Eunice, Jr.

L. P. Richardson & E. E. Eunice, Jr.

On the 29 day of March, 1966, the above named Defendant was arraigned on above charge before the Municipal Court of the City of Gainesville, he having been arrested by the Police (on view of offense committed). (Warranty duly issued.) Plea of ..... guilty entered. On motion of (City) (Defendant) case was continued until .....

On the 29 day of March, 1966, the case was called for trial and the following witnesses were sworn for the City:

and the following for Defendant: ..... After hearing the evidence and duly considering the same, the Court found and adjudged the Defendant guilty of the charge, and ordered that the Defendant serve 30 days and pay a fine of $250.00 and in default of payment of said fine it is ordered that the Defendant to put to work on the streets for 30 days and be committed to the custody of the Chief of Police.

Appeal lic. revoked by dept. WWH

Defendant having given a bail bond in the sum of $..... and not appearing for trial when called, ..., it is ordered that said bail be forfeited and estreated to the use of the City.
to be appealed

/s/ Wm. Wade Hampton
Municipal Judge

Cash bond . . . $500.00 #3-10-51
Sureties on Bond

.....

.....

Witness .....

.....

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1968

No. 745

C. L. HILLIARD,

Appellant,

vs.

CITY OF GAINESVILLE, FLORIDA,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

MOTION TO AFFIRM OR DISMISS

OSEE R. FAGAN
Attorney for Appellee
212 SE First Street
Gainesville, Florida

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1968

No. 745

C. L. HILLIARD,

Appellant,

vs.

CITY OF GAINESVILLE, FLORIDA,

Appellee.

MOTION TO AFFIRM OR DISMISS

Appellee, pursuant to Rule 16 of this Court, respectfully moves that the decision of the Supreme Court of Florida, *Hilliard v. City of Gainesville*, 213 So. 2d 689 (Fla. 1968), here appealed be affirmed on the ground that it is manifest that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument, or in the alternative to dismiss this appeal on the ground that it does not present a substantial federal question.

STATEMENT

The Appellant was convicted by the Municipal Judge for violation of a municipal ordinance proscribing the offense of driving a motor vehicle while under the influence of intoxicating beverages from which he took, as a matter of right, an appeal to the Circuit Court which reversed for failure to provide a jury trial. Certiorari sought by the City of Gainesville in the First District

Court of Appeals of Florida resulted in reinstatement of the Judgment of the Municipal Court, which was then also upheld on Certiorari by the Supreme Court of Florida. The Supreme Court of Florida noted *Duncan v. Louisiana*, 391 U.S. 145, 20 L.Ed. 2d 494, 88 S.Ct. 1444 (1968), and properly distinguished this case from the rule in *Duncan* since the offense is for a violation of a municipal ordinance and the maximum authorized penalty is sixty days imprisonment in the City Jail and a $500.00 fine, *Hilliard v. City of Gainesville*, 213 So. 2d 689 (Fla. 1968). The actual sentence in this case was thirty days imprisonment, fifteen of which were suspended, and a $250.00 fine.

Appellant contends that notwithstanding the maximum authorized sentence is only sixty days, the case sub judice is not within the limits and requirements imposed by *Duncan;* first, because of the intrinsic nature of the offense, and second, because of the additional penalty of loss of driver's license.

ARGUMENT

The decision of the Supreme Court of Florida is correct. The City of Gainesville derives its power from the Florida Legislature and under its Charter, Chapter 12760, Laws of Florida 1927, it has the power to try offenses only without a jury for violating municipal ordinances and the maximum sentence which may be imposed is sixty days imprisonment and $500.00 fine. Sec. 7(z), Ch. 12760, Laws of Florida (1927), (The Gainesville Charter) reads that the City of Gainesville shall have the power:

> "(z). To make and enforce all ordinances, rules and regulations necessary or expedient for the purpose of

> carrying into effect the powers conferred by this charter or by any general law, and to provide and impose suitable penalties for the violation of such ordinances, rules and regulations, or any of them, *by fine not exceeding five hundred dollars or imprisonment at hard labor on the streets or other works of the city, for a term not exceeding sixty days, or both.*" (Emphasis added).

These maximum penalties are consistent with the general laws of Florida relating to municipalities, Section 165.19, Florida Statutes (1967).

The Florida Constitution ratified in 1886 provides in Section 3 of the Declaration of Rights:

> "The right of trial by jury shall be secured to all, and remain inviolate forever."

and further in Section 11, Declaration of Rights:

> "In all criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury, * * * ".

The Supreme Court of Florida has on numerous occasions expressly construed these Constitutional requirements as not applying to violations of municipal ordinances. *Theisen v. McDavid*, 34 Fla. 440, 16 So. 321 (1894); *Hunt v. Jacksonville*, 34 Fla. 504, 16 So. 398 (Fla. 1894); *Orr v. Quigg*, 135 Fla. 653, 185 So. 726 (Fla. 1938); *Wright v. Worth*, 83 Fla. 204, 91 So. 87 (Fla. 1922); and *Gillooley v. Vaughn*, 92 Fla. 943, 110 So. 653 (Fla. 1926). The Supreme Court of Florida has also specifically held that these same Constitutional requirements

do not apply to trial in Municipal Court for the offense of operating a motor vehicle while under the influence of intoxicating beverages. *State v. Parker,* 87 Fla. 181, 100 So. 260 (Fla. 1924); *Boyd v. County of Dade,* 123 So. 2d 323 (Fla. 1960); and *Hilliard v. City of Gainesville,* 213 So. 2d 689 (Fla. 1968).

Although one may disagree, and Judges and Courts may disagree, as to whether a particular offense should be classified as "petty" or "serious", depending on one's attitude, it would seem of extreme importance to this Court that determinations by State Courts in classifying an offense as "petty" or "serious" should have great weight when applying subjective tests and especially where no clear standard for legal determination has been otherwise set; provided, of course, that such determination is not contrary to mechanical standards set such as length of maximum sentence.

The Florida Supreme Court has always recognized that "serious" offenses require jury trials while "petty" offenses do not and such characterizations have been made under Florida's Constitutional provisions not too dissimilar to those in our United States Constitution. Since essentially the same safeguards are sought to be preserved and for the same basic reasons, and since in such characterizations there results no violence to the mechanical test involved regarding maximum sentence, when a State Court has determined that the offense of violating a municipal ordinance denouncing driving a motor vehicle while under the influence of intoxicating beverages is a "petty" offense allowing a maximum sixty days imprisonment, such determination by a State Court should not be overturned. Disagreement with such a determination would arise only

because of the danger considered to the public generally by such offender, (a consideration which the State Court should be more properly and ably concerned with under our federal system) but it is the offender's rights which are constitutionally protected in guaranteeing a jury trial and not those of the public generally.

It is clear that the mechanical tests of maximum imprisonment allowed as suggested in *Duncan*, supra, and *Cheff v. Schnackenberg*, 384 U.S. 373, 16 L.Ed. 2d 629, 86 S.Ct. 1523 (1966), are not violated here since the maximum imprisonment that the City may impose is only sixty days. To declare that the intrinsic nature of this offense is "serious" and therefore should be so characterized legally is to suggest that the Supreme Court of Florida is in error in its subjective determination of matters which it is more directly responsible for, the public peace, welfare and safety of the people generally.

The distinction between "petty", or "serious" offenses is attempted by numerous authorities: Frankfurter & Corcoran, "Petty Federal Offenses And The Constitutional Guaranty Of Trial By Jury", 39 Har. L. Rev. 917 (1926); Kaye, "Petty Offenders Have No Peers!", 26 U. of Chi. L. Rev. 245 (1959), and cases decided by and familiar to this Court, but in considering the guarantees safeguarded in our Constitution, distinctions should be drawn not by considering whether the offense is "petty" or "serious" to the public generally, but whether such a charge and conviction of a defendant may result in serious consequences to the defendant. The constitutional protection of a jury trial is for the benefit of the person charged, and not for the government representing the people.

Nor do we believe that because defendant's driver's license is placed in jeopardy that therefore the constitutional requirements of a jury trial are invoked. Jury trial safeguards are for protection against imprisonment and certainly one may not assert that such safeguards are to be extended to protect against possible loss of a pure privilege. That a driver's license is a privilege and may be administratively taken away has been upheld by various State Courts: 71 ALR 616, 108 ALR 1162 and 125 ALR 1459. This Court refused to overturn the administrative revocation of a driver's license in *La Forest v. District of Columbia,* 67 App. D.C. 396, 92 F.2d 547 Cert. Den., 302 U.S. 760, 82 L.Ed. 588, 58 S.Ct. 367 (1937). The State of Florida is aligned with those jurisdictions which hold that a driver's license is a privilege and bestows no absolute property right on the licensee. Although such licenses may not be:

> "* * * revoked arbitrarily or capriciously, we have nonetheless consistently followed the rule, which appears to be unanimous throughout the country, to the effect that upon a proper showing in accord with the prevailing statutes a motor vehicle operator's license may be revoked." *Smith v. City of Gainesville,* 93 So. 2d 105, 106 (Fla. 1957).

It should be noted that the City of Gainesville has not and could not revoke the driver's license in this case. This authority is vested in the State Department of Public Safety, Ch. 322, Florida Statutes (1967), specifically Sec. 322.26. The Florida Supreme Court has declared that:

> "* * * revocation of a driver's license is not regarded as punishment of the offender. Under the applicable

statute it is an administrative remedy for the public protection that mandatorily follows conviction for certain offenses." *Smith v. City of Gainesville,* 93 So. 2d 105, 107, (Fla. 1957).

Since the Florida Supreme Court in construing Florida regulatory statutes governing the revocation of a state given privilege is not punishment to the offender, such construction should be persuasive here and further limit the thrust of Appellant's contention that his license revocation places him within the ambit of Sixth Amendment protections. It should be noted that Florida law permits one whose driver's license has been revoked to seek a hearing before the Department of Public Safety for reinstatement of such driver's license. Section 322.271, Florida Statutes (1967).

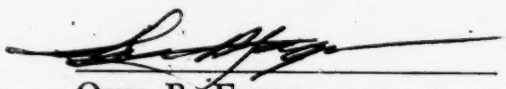
CONCLUSION

The underlying and fundamental purpose of all laws should be the protection of rights and in this instance the rights of the individual defendant—Appellant. Except for a trial by jury Appellant has been afforded every protection and all due process. The record here clearly demonstrates that Appellant was fairly tried before a qualified and impartial Judge; he was ably represented by competent counsel; he was afforded a public trial and faced and cross-examined witnesses against him; the evidence was abundant to support the judgment; and his case has been reviewed by three Appellant Courts including the Supreme Court of Florida which decision was rendered subsequent to and in recognition of the rule in *Duncan.* The maximum penalty which could have been imposed is below the limits set forth in *Duncan* and *Cheff* and as

defined by Congress in 18 U.S.C.1. The offense has been characterized by the Florida Supreme Court as "petty".

We, therefore, respectfully submit that the decision of the Supreme Court of Florida should be affirmed or this appeal dismissed.

Respectfully submitted,



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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1968

NO. 745

C. L. HILLIARD,

Appellant,

—VS—

CITY OF GAINESVILLE, FLORIDA

Appellee.

APPEAL FROM THE SUPREME COURT
OF THE STATE OF FLORIDA

PETITION FOR REHEARING

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IN THE SUPREME COURT OF THE UNITED STATES
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PETITION FOR REHEARING

C. L. HILLIARD, Appellant, presents his Petition for a Rehearing of the above entitled cause, and, in support thereof, respectfully shows:

GROUNDS FOR REHEARING

1. The initial municipal prosecution in the cause herein occurred in March of 1966. In 1967 the Florida Legislature enacted what is popularly referred to as the implied consent law. (Florida Statutes §322.261, 322.262). This act prescribes the procedure to be followed in obtaining evidence from persons accused of driving while intoxicated by making mandatory chem-

ical tests for intoxication. The law also contains the following provisions:

> Any person charged with driving while under the influence of alcoholic beverages to the extent that his normal faculties were impaired shall be entitled to trial by jury according to the Florida Rules of Criminal Procedure. (Fla. Stat. §322.262(4)).

2. Appellant argued below in a Petition for Rehearing filed in the Florida District Court of Appeal, First District, that the implied consent law, although it did not become effective until July 1, 1968, and was therefore not applicable to his case, represented a legislative declaration that the offense of driving while intoxicated was an offense of a serious nature.

3. The District Court of Appeal in denying the Petition for Rehearing expressed the opinion that, even though the law was enacted subsequent to the proceeding under consideration, the legislative classification argument had merit. However, the Court did not feel that the implied consent law applied to municipal prosecutions. On this point the Court said in part:

> Although the argument of respondent is meritorious, we are not prepared to say that the above referred to statute should be construed to be applicable to offenses against municipal ordinances which prohibit the operation of vehicles while under the influence of intoxicating beverages, or that it was not the intent of the legislature to confine jury trials, in cases of this kind only to prosecutions in state courts. If it had been the intent of the legislature to extend the right to trial by jury in cases of this kind to prosecutions in municipal courts, we feel it would have been more specific in so providing in clear and unambiguous terms. (*City of Gainesville* v. *Hilliard*, 207 So.2d 520, 526 [Fla. App. 1968]).

4. In referring to the Florida District Court of Appeal's disposition of the case sub judice, it should be noted that the Court certified the case to the Supreme Court of Florida for the reason that:

> The constitutional right to a trial by jury in any case in which, upon conviction, the offender may be imprisoned is a matter of great public interest and concern to all citizens of the state. We do, therefore, hereby determine and certify that the decision rendered herein is one which passes upon a question of great public interest as contemplated by Section 4(2) Article V, Constitution of Florida. (See Record Item 3, Vol. 1, p. 10).

5. The Florida Supreme Court in not considering the legislative declaration argument stated as follows:

> We pretermit a discussion of Fla. Stat. §322.262 (4) (1967). It was enacted subsequent to the trial of the case at bar, and therefore does not control the result. A decision on its effect must await another day. (*Hilliard* v. *City of Gainesville*, 213 So.2d 689, 691 (Fla. 1968)).

6. Three days before this Court dismissed the appeal herein for want of a substantial federal question, the Circuit Court of the Twelfth Judicial Circuit, in and for Hendry County, Florida, rendered a decision in the case of STATE OF FLORIDA ex rel., JAMES ALLEN DAVIS, Relator, versus FRED C. SIKES as Mayor of the City of Clewiston, a political subdivision of the State of Florida and JOHN M. POTTER, as Municipal Judge, Respondents. The opinion in the Davis case is attached to this Petition for Rehearing. The Court held in Davis that the implied consent law and its jury trial provisions applied to municipal prosecutions.

7. Furthermore, the Circuit Court in Davis, as did the Cir-

cuit Court in the case sub judice, specifically held that driving while intoxicated was not a petty offense saying as follows:

> IT IS FURTHER ORDERED AND ADJUDGED on a matter implicit in this entire case, whether or not a charge of D.W.I. is a crime or a petty offense. This Court finds and determines that not only due to the penal provisions of fine and/or imprisonment adjudged against a person convicted of D.W.I., but under the realities of modern life, the privilege of having a license to drive a car in the State of Florida is a valuable privilege, the loss of which constitutes too great a penalty to be scrubbed off as a petty offense, therefore, this Court does now here rule that the crime of driving while intoxicated is a crime. It is not an offense nor a petty offense, it is a crime.

CONCLUSION

In view of the present litigation in the state Court on this matter and this Court's ruling that the cause sub judice does not involve a substantial federal question, Appellant respectfully requests the Court to remand and return this case to the Supreme Court of Florida for further consideration in light of the Davis decision.

CERTIFICATE OF COUNSEL

I, RICHARD J. WILSON, Counsel for the above-named Appellant, do hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

Richard J. Wilson

RICHARD J. WILSON
Attorney for Appellant
5 Southeast First Street
Gainesville, Florida

IN THE CIRCUIT COURT
OF THE TWELFTH JUDICIAL CIRCUIT,
IN AND FOR HENDRY COUNTY, FLORIDA
CASE NO. 68-171

Certified Copy

/s/ Dorothy Moore Clark
DOROTHY MOORE CLARK
Clerk Circuit Court

By: Doris Milicevic, D.C.

STATE OF FLORIDA ex rel.,
JAMES ALLEN DAVIS

Relator,

—vs—

FRED C. SIKES as Mayor of the City of Clewiston,
a political subdivision of the State of Florida and
JOHN M. POTTER, as Municipal Judge,

Respondents.

64631

Filed in Official Records Hendry County, Florida
Time: 2:40 P.M.
Date: January 17, 1969
DOROTHY MOORE CLARK
CLERK CIRCUIT COURT

COURTS RULING

This cause coming on to be heard before this Court on the Relators Suggestion for Writ of Prohibition and the Court having issued its Alternative Writ of Prohibition and upon final hearing that the Alternative Writ be made absolute, and both the Relator and the Respondent having filed Briefs herein, and having presented oral argument to the Court, and the Court being advised in the premise, it is upon consideration found as follows:

On August 9, 1968, the Relator, JAMES ALLEN DAVIS, while operating a motor vehicle in the City of Clewiston, Florida, was arrested for violation of the City of Clewiston municipal ordinance which prohibits driving a motor vehicle while under the influence of alcoholic beverages to the extent normal faculties are impaired.

Relator refused the arresting officer's request to submit to an approved chemical test of his breath for the purpose of determining the alcoholic content of his blood. The arresting officer submitted his sworn statement to the Department of Public Safety pursuant to Section 322.261 Florida Statutes, 1967, that he had reasonable cause to believe Relator had been driving a motor vehicle within the state while under the influence of alcoholic beverages and that the Relator had refused to submit to the test after being requested.

Thereafter, the Department of Public Safety notified Relator that his driving privilege would be suspended unless Petition for a Hearing was filed with the trial court having jurisdiction of the offense of which he stood charged.

The Relator filed a Petition for Hearing and Demand for Jury trial citing that the Petition and Demand were pursuant to Section 322.261 Florida Statutes, 1967.

The Mayor's Court (Municipal Court hereafter) of the City of Clewiston denied Relator's demand for jury trial and set the matter down for trial on November 21, 1968.

Relator filed a Suggestion for Writ of Prohibition with this Court seeking to stop the Municipal Court from trying Relator without a jury on the issue of refusal to submit to a chemical breath test and on the issue of driving while under the influence of alcoholic beverages. This Court issued an alternative Writ of Prohibition.

Four questions were presented in this case. The first question is basically, whether a person accused of driving while intoxicated (hereafter, D.W.I.) is entitled to trial by jury on the merits of his case.

Question two (2) is whether the implied consent law, with its various provisions, under Chapter 322.261 and 322.262, Florida Statutes, 1967, is constitutional.

Question three (3) is whether the provisions under the above cited Statutes, providing for the actions by a Municipal Court in determining the issues of the legality of lawfulness of the procedure by the arresting officer and the Department of Public Safety leading to a revocation of ones drivers license is a trial which would stand in bar of a sebsequent trial on the merits of the D.W.I. and would constitute a double jeopardy.

Question four (4), whether a refusal for a driver to take the chemical test prescribed by Chapter 322.261 and a subsequent revocation of his license based upon such refusal, is a denial of the drivers rights under the Constitution of the United States of America and the State of Florida.

These four (4) foregoing questions are the ones that confront the Court and which the Court will now answer.

Question 1: In Chapter 322.261 the legislature of Florida sets out a comprehensive program in an effort to confront the D.W.I. problem in Florida. This is obviously the legislative purpose of the act and the legislature has, in reliance on the case of *Schmerber* vs. *California,* 384 US 757, 16 L ed. 2nd 908, 86 S Ct 1826, placed a program in effect calling for compulsory chemical tests for intoxication. This act spells out in detail just how this is to be done as a concommitant to having the privilege of a drivers license to operate a motor vehicle on the roads and streets in the State of Florida. The action begins with the peace officer making a lawful arrest. The powers and duties created by this act are extended to Municipal peace officers and the hearings provided in that act can be heard in Municipal Courts or in whatever Court has trial jurisdiction in the matter. In this case the Municipal Court of the City of Clewiston, Florida, was the trial Court having jurisdiction and heard the matter as to the lawfulness of the actions of the Department of Public Safety, in revoking the relators drivers license. Chapter 322.261(f) of the act provides that the Municipal Court can suspend the driving privileges upon a finding of the correctness of the procedures taken by the Department of Public Safety. It would thus appear then, that all the new attacks on the problem of D.W.I. are now extended to all the trial courts of the State of Florida having jurisdiction to try a case of D.W.I. In examining the legislative history of these particular laws we find that this Chapter 322.261 was in effect, actually paragraph one, or section one, of Chapter 67-308, Laws of Florida, 1967, Chapter 322.262 is a section two (2) and section three (3) or paragraphs two (2) and paragraph three (3) of this same law, viz., Chapter 67-308, Laws of Florida, 1967. Therefore, it must be that the two laws we find in the bound statute books under separate Chapter, 322.261 and 322.262, are really part of the same law, that is, Chapter 67-308, Laws of Florida, 1967, and, therefore, they must be read in pari materia with one another. In reading these two

chapters together it must be concluded that the legislature in extending to the Municipalities the power and the jurisdiction conferred by this act, also extended the safeguards of trial by jury provided by Chapter 322.262(4) to a person subject to the act. In view of the foregoing, this Court does now rule and construes this statute to mean that trial by jury is extended under this Chapter to all persons charged with D.W.I. in all the Municipal Courts in the State of Florida, and this Court now finds, and rules, that the Relator, Davis, is entitled by a trial by jury on the offense with which he is charged.

The Respondents able brief at page four (4) tells us that the Municipal Court of the City of Clewiston has the power to provide a jury trial. So be it. The demand for jury trial has been made and under this Courts reasoning above cited, the accused is entitled to a jury trial. In making this ruling the Court is aware of the Case of *Hilliard* vs. *Gainesville,* 213 So. 2nd.689, but as the Supreme Court of Florida said in that case, "we pretermit a discussion of Florida Statutes, Section 322.262(4), 1967 F.S.A. It was enacted subsequent to the trial of the case at bar and therefore does not control the result. A decision of its effect must await another day". That day has now come.

It is altogether fitting and proper that we should do this. Ralph Waldo Emerson, in his Essay on Compensation wrote in effect; that for every wrong there must be a right, for every good there must be a bad, for every positive there must be a negative, for every right there must be a duty, for every darkness there must be a light. This law of Compensation must have been presumed in the collective wisdom of the Legislature of Florida in extending the ability of the police to attack the D.W.I. problem. It probably gave the police a great deal more authority than they did have when they enacted this law and must, by way of compensation, give to all persons accused under it a right of trial by jury, and the Court does now here so rule.

In view of the Courts ruling here most of the questions become moot but do require a ruling by the Court and the Court shall now rule on those.

As to Question Two (2), the double jeopardy problem, the question is; whether the force subjecting of the Defendant to the chemical test provided by the Statutes is unconstitutional. This question is answered that, although it does not comport with this Courts view of things, this Court is bound by the ruling of *Schmerber* vs. *California*, above cited, and it is the ruling here of this Court that the provisions of Chapter 322.261 insofar as same relate to the taking of chemical intoxication tests, are constitutional. The provisions for jury trial which this Court finds to be mandatory eases some of the sting of this but *Schmerber* is still the law of the land. Regardless of that it was closely split decision, this Court is bound by it and has no choice.

We go now to the matter of the hearing provided under these Chapters. This is the hearing by the Court having trial jurisdiction and the question is asked; whether this hearing should be before a jury. The hearing provided fot in Chapter 322.261(e) (f), is not a trial in any sense of the word. There is no issue of the guilt nor innocence nor trial on a crime being determined in this. Instead, it is the Court sitting in a quasi-appellate role to determine if the suspension was lawful. It would be analogized on a hearing on certiorari, much in the same way the appellate court hears matters arising both from Courts and administrative agencies, whether the particular agency involved in this case, whether the Department of Public Safety acted in a lawful manner. It could further be likened to a trial Court ruling on the admissibility or competency of evidence tendered to the Court. It could be further likened to a trial Court hearing a motion for directed verdict with the jury retired. The basic question is not guilt nor innocence, but legal sufficiency of what has been done. In view of the foregoing, the Court answers this

question; is a jury trial allowed in this instance, and the Court answers, no, it is not.

As to Question Three (3), it has been shown above that the hearing provided in Chapter 322.261 is quasi-appellate proceeding and does not constitute a trial, therefore, no jeopardy attaches. In the present instance the matter is moot due to the fact that in this case there has been no arraignment, no plea and no trial on the matter. However, in assuming that a trial has been held on the merits of the D.W.I. case the Court answers Question Three (3); as to whether this hearing constitutes a trial in bar at the trial on the merits through double jeopardy; the Court answers, no, it does not.

In view of the ruling above and upon the authority of *Schmerber* vs. *California,* no answers are required to Relators Question Four (4).

NOW THEREFORE, IT IS ORDERED AND ADJUDGED:

1. The Respondents, City of Clewiston through its Mayor and Judge, be and they hereby are permanently enjoined and prohibited from trying the Relator for the offense charged except by a jury impanelled to hear and determine the issues as provided by law.

2. This Court takes judicial notice that the County Judges Court of Hendry County has concurrent jurisdiction with the Municipal Court of Clewiston and this and all other related matters and if it is found that a jury cannot be provided to this Defendant in the Municipal Court of Clewiston, Florida, and they choose not to proceed in this matter that this ruling here should not be in bar of a trial before the County Judges Court of Hendry County, Florida.

IT IS FURTHER ORDERED AND ADJUDGED on a matter im-

plicit in this entire case, whether or not a charge of D.W.I. is a crime or a petty offense. This Court finds and determines that not only due to the penal provisions of fine and or imprisonment adjudged against a person convicted of D.W.I.; but under the realities of modern day life, the privilege of having a license to drive a car in the State of Florida is a valuable privilege, the loss of which constitutes to great a penalty to be scrubbed off as a petty offense, therefore, this Court does now here rule that the crime of driving while intoxicated is a crime. It is not an offense nor a petty offense, it is a crime.

WHEREFORE, IT IS ORDERED AND ADJUDGED that the Alternative Writ of Prohibition herein before entered by this Court as delineated by the foregoing, be and the same hereby is made ABSOLUTE.

DONE, ORDERED AND ADJUDGED in open Court this 10th day of January, 1969.

/s/ Harold S. Smith

Circuit Judge

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

HILLIARD *v.* CITY OF GAINESVILLE.

APPEAL FROM THE SUPREME COURT OF FLORIDA.

No. 745. Decided January 13, 1969.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted.